

# United States Senate

March 11, 2021

The Honorable Pete Buttigieg  
Secretary of Transportation  
U.S. Department of Transportation  
1200 New Jersey Avenue, SE  
Washington, DC 20590

Dear Secretary Buttigieg:

We write to urge the Department of Transportation (DOT) to overturn an ill-advised rule — finalized in the waning days of the Trump administration — that needlessly restricts the DOT’s authority to protect air travelers from harm and abuse. Specifically, we request that you begin the process of undoing the rule entitled “Defining Unfair or Deceptive Practices,”<sup>1</sup> which, as many warned when the Trump administration proposed it last year, hamstring the DOT’s ability to address consumer issues such as lost baggage, oversold flights, and tarmac delays. Additionally, the rule could prevent the DOT from resolving passenger complaints that have skyrocketed by more than 500 percent compared to the year before the coronavirus pandemic,<sup>2</sup> driven largely by complaints arising out of airlines often refusing to refund payments for unused tickets during the global health emergency.<sup>3</sup>

The rule “Defining Unfair or Deceptive Practices” creates new definitions of the terms “unfair” and “deceptive” under the DOT’s aviation consumer protection statute, which authorizes the DOT to investigate and take action against harmful airline business practices.<sup>4</sup> Though the new definitions mirror longstanding definitions of “unfair” and “deceptive” in the Federal Trade Commission (FTC) Act,<sup>5</sup> the new DOT definitions do not work in the aviation context. Alarming, they limit the circumstances under which the DOT can take future action against airline policies that negatively impact travelers.

For these reasons, FTC Commissioner Rohit Chopra urged the DOT not to adopt his own agency’s definitions, noting that the FTC’s enforcement actions and rulemakings plummeted after it adopted its current definition of an “unfair” business practice.<sup>6</sup> Commissioner Chopra explained that key assumptions behind the FTC’s “unfair” definition are “poorly suited to airline regulation” because there is less competition and consumer choice in aviation than in FTC-

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<sup>1</sup> Defining Unfair or Deceptive Practices, 85 FR 78707 (Jan. 6, 2021) (to be codified at 14 C.F.R. pt. 399).

<sup>2</sup> OFF. OF AVIATION CONSUMER PROTECTION, AIR TRAVEL CONSUMER REPORT 63 (2021), [https://www.transportation.gov/sites/dot.gov/files/2021-02/February\\_%202021%20ATCR.pdf?source=email](https://www.transportation.gov/sites/dot.gov/files/2021-02/February_%202021%20ATCR.pdf?source=email).

<sup>3</sup> Christopher Elliott, *What consumers learned about travel complaints in 2020*, Wash. Post (Dec. 2 2020), [https://www.washingtonpost.com/lifestyle/travel/what-consumers-learned-about-travel-complaints-in-2020/2020/12/02/8ac3d5f8-331d-11eb-b59c-adb7153d10c2\\_story.html](https://www.washingtonpost.com/lifestyle/travel/what-consumers-learned-about-travel-complaints-in-2020/2020/12/02/8ac3d5f8-331d-11eb-b59c-adb7153d10c2_story.html).

<sup>4</sup> Defining Unfair or Deceptive Practices, *supra* note 1; 49 U.S.C. § 41712.

<sup>5</sup> 15 U.S.C. § 45(a)(2).

<sup>6</sup> Defining Unfair or Deceptive Practices, *supra* note 1, at 78709.

regulated industries.<sup>7</sup> As a result, the DOT must be able to regulate a broader set of potentially harmful practices than the FTC’s definitions can reach.

We are also concerned that the DOT’s new, narrower definitions could open the door to legal challenges seeking a review of established passenger protections that are based on a broader understanding of what counts as an “unfair” or “deceptive” business practice. For example, the new definitions could undermine existing consumer protection rules that rely on the DOT’s prior approach to the terms “unfair” and “deceptive,” which resulted in limits on hidden fees and required compensation for overbooking.<sup>8</sup>

Important differences between the DOT and FTC also make copying the FTC’s approach inappropriate. For example, state Attorneys General — not just the FTC — have authority throughout the country to protect consumers from unfair and deceptive acts and practices in general commerce.<sup>9</sup> By contrast, only the DOT has authority to tackle consumer protection issues in the aviation industry, including ticket refunds, oversold flights, tarmac delays, and more.<sup>10</sup> The DOT therefore needs more flexible and robust enforcement authority than the FTC — a distinction reinforced by Congress expressly legislating definitions in the FTC Act,<sup>11</sup> but not doing the same in the DOT’s aviation consumer protection statute.

We believe that mirroring the FTC’s definitions unnecessarily restricts the DOT’s consumer protection authority, undermines existing passenger protections, and limits your agency’s ability to hold airlines accountable. By contrast, overturning this rule will restore the DOT’s authority to address both systemic problems in aviation and new challenges the pandemic has created.

Air travelers have long been subjected to exorbitant fees and other anti-consumer airline business practices. As a result, from 2016 through 2019, there were an average of 16,732 complaints filed each year with the DOT, raising concerns about flight delays, baggage issues, and more.<sup>12</sup> In 2020, passenger complaints skyrocketed to 102,550,<sup>13</sup> especially over airlines’ refusal to refund payments for unused airline tickets during this global health emergency.<sup>14</sup> Yet, despite these longstanding and record-breaking complaints, the DOT under your predecessor chose to restrict

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<sup>7</sup> Comment of Federal Trade Commissioner Rohit Chopra, Docket DOT–OST–2019–0182, available at [https://www.ftc.gov/system/files/documents/public\\_statements/1576174/chopra\\_comment\\_to\\_us\\_department\\_of\\_transportations\\_dot-ost-2019-0182.pdf](https://www.ftc.gov/system/files/documents/public_statements/1576174/chopra_comment_to_us_department_of_transportations_dot-ost-2019-0182.pdf).

<sup>8</sup> *Id.*

<sup>9</sup> Carolyn L. Carter, *Consumer Protection in the States – A 50-State Report on UDAP Statutes*, National Consumer Law Center (Feb. 2009), [https://www.nclc.org/images/pdf/udap/report\\_50\\_states.pdf](https://www.nclc.org/images/pdf/udap/report_50_states.pdf).

<sup>10</sup> 49 U.S.C. § 41712.

<sup>11</sup> 15 U.S.C. § 45(a)(2).

<sup>12</sup> *Air Travel Consumer Report: December 2019, Full Year 2019 Numbers*, U.S. DEP’T OF TRANSP. (Feb. 19, 2020), [https://www.bts.gov/newsroom/air-travel-consumer-report-december-2019-full-year-2019-numbers#:~:text=In%202019%2C%20the%20Department%20received,941%20received%20in%20November%202019; Christopher Elliott, Airline fines have fallen to historic lows. That could be bad news for travelers, Wash. Post \(Dec. 4, 2019\), https://www.washingtonpost.com/lifestyle/travel/as-passenger-dissatisfaction-soars-airline-fines-hit-a-historic-low/2019/12/04/1a8c0922-1519-11ea-9110-3b34ce1d92b1\\_story.html](https://www.bts.gov/newsroom/air-travel-consumer-report-december-2019-full-year-2019-numbers#:~:text=In%202019%2C%20the%20Department%20received,941%20received%20in%20November%202019; Christopher Elliott, Airline fines have fallen to historic lows. That could be bad news for travelers, Wash. Post (Dec. 4, 2019), https://www.washingtonpost.com/lifestyle/travel/as-passenger-dissatisfaction-soars-airline-fines-hit-a-historic-low/2019/12/04/1a8c0922-1519-11ea-9110-3b34ce1d92b1_story.html).

<sup>13</sup> OFF. OF AVIATION CONSUMER PROTECTION, *supra* note 2.

<sup>14</sup> Elliott, *supra* note 3.

its consumer protection authority at what appears to be the request of airlines themselves.<sup>15</sup> Under your new leadership, the DOT should reverse course and instead step up consumer protection in the skies.

Consumers and consumer protection groups also know that the “Defining Unfair or Deceptive Practices” rule was a step in the wrong direction. Individual consumers filed approximately 180 comments and “almost uniformly opposed” the proposed rule because they believed it would weaken aviation consumer protection.<sup>16</sup> Organizations representing consumer interests meanwhile said that the proposed rule would “give airlines even greater incentives to engage in the kinds of unfair and deceptive practices that Congress intended [the DOT] to address,”<sup>17</sup> and would “result in significant consumer harm.”<sup>18</sup> Though the prior DOT did not listen to these consumers, the DOT under your leadership should.

In light of these concerns, we urge you to begin the process of revoking the “Defining Unfair or Deceptive Practices” rule. We know you share our goal of moving the DOT towards a future with more protections for consumers and away from the past four years of prioritizing powerful interest groups. We are ready to work with you to achieve that vision and hope you will begin with this important first step in the right direction.

Thank you for your attention to this important matter. Due to the telework policies of many congressional offices during the coronavirus outbreak, physical signatures are unavailable. The listed Senators have asked to be signatories to this letter.

Sincerely,

Edward J. Markey  
United States Senator

Maria Cantwell  
United States Senator

Tammy Baldwin  
United States Senator

Richard Blumenthal  
United States Senator

Sheldon Whitehouse  
United States Senator

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<sup>15</sup> Comment of A4A, Docket DOT-OST-2017-0069-2753, available at [www.regulations.gov](http://www.regulations.gov).

<sup>16</sup> Defining Unfair or Deceptive Practices, *supra* note 1, at 78709.

<sup>17</sup> Comments of National Consumers League and Consumer Action, Docket DOT-OST-2019-0182, available at [https://nclnet.org/wp-content/uploads/pdf/NCL\\_DOT\\_UDAP\\_COMMENTS\\_-\\_05-28-2020\\_FINAL.pdf](https://nclnet.org/wp-content/uploads/pdf/NCL_DOT_UDAP_COMMENTS_-_05-28-2020_FINAL.pdf).

<sup>18</sup> Comments of Consumer Reports, Consumer Federation of America, and U.S. PIRG, Docket DOT-OST-2019-0182, available at <https://advocacy.consumerreports.org/wp-content/uploads/2020/05/DOT-UDAP-CR-CFA-PIRG-comments-5-28-20-FINAL.pdf>.